The Limitations on Critical Thinking on Religious Issues under Article 20 of ICCPR and its Relation to Freedom of Expression

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Abstract
This article aims at examining the admissible scope of limitations on critical thinking on religious issues and the circumstances under which criticism of a religion may fall within the scope of Article 20 of the ICCPR. What does this imply in relation to freedom of expression, in particular artistic freedom? To what extent does the promotion of freedom of expression require States to punish advocacy of religious hatred which constitutes incitement to discrimination, hostility or violence? The main premise of the article is that the questions mentioned above should be seen in terms of the balance and complementarity of competing rights, namely, the right to freedom of religion and respect for human dignity of believers vis-à-vis the right to freedom of expression. This balance cannot invariably be set for all places, but should instead be maintained taking into account the historical experiences and local conditions. Furthermore, the article argues that the right to freedom of expression is not absolute and that international human rights law affirms certain restrictions on exercising this right. The question, however, of where to draw the boundaries between the right to freedom of expression and advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence can best be answered contextually and with due regard to, inter alia, local conditions, history, culture and political tensions.

Keywords
freedom of religion; freedom of expression; complementarity; religious hatred; incitement to discrimination, hostility or violence

Thoughts have wings, no one can stop them.1

What is going on now is a trial of thought. From any judicial point of view, it is impossible to use legal principles to try someone’s thoughts.2

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1 Quoted from the film al-Massir (The Destiny), directed by Youssef Shahine, Cairo, Egypt, 1997.
2 Adnan Buyung Nasution, defence lawyer for independent labour leader Mukhtar Pakahan, Jakarta
Mugesera himself did not commit genocide, although his speech sparked a series of atrocities against Tutsi in the Gisenyi region of the country. His remarks constituted direct and public incitement to commit genocide. Mugesera’s speech has been cited as one of the defining moments in the build-up to genocide. The road to genocide in Rwanda was paved with hate speech.3

On 30 September 2005, the Danish newspaper *Jyllands-Posten* published 12 previously solicited cartoons depicting the Prophet Muhammad. One cartoon showed the Prophet wearing a bomb-shaped turban with a lit fuse. Another depicted him as a devil holding a grenade, and still another imagined him in paradise offering young virgins to suicide bombers.4 The consequences of publishing these cartoons have been far-reaching. There have been riots, demonstrations, and widespread violent protests throughout the world.5

On 27 March 2008, the Dutch Member of Parliament, Mr. Geert Wilders released a film entitled “Fitna” on the Internet. The film illustrates an increasing pattern in which Muslims are associated exclusively with violence and terrorism.6 These are just two recent examples of a series of freedom of expression related incidents which continue to polarize multicultural societies, cause tensions and fuel xenophobia and racist attitudes.7

This article aims at examining the admissible scope of limitations on critical thinking on religious issues and the circumstances under which criticism of a religion may fall within the scope of Article 20 of the ICCPR. What does this imply in relation to freedom of expression, in particular artistic freedom? To what extent does the promotion of freedom of expression require States to punish

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advocacy of religious hatred which constitutes incitement to discrimination, hostility or violence.\(^8\)

The main premise of the article is that the questions mentioned above should be seen in terms of the balance and complementarity of competing rights, namely, the right to freedom of religion and respect for human dignity of believers vis-à-vis the right to freedom of expression. This balance cannot invariably be set for all places, but should instead be maintained taking into account the historical experiences and local conditions, and cannot be set for all places in the same way. For example, the manner in which freedom of expression, in particular artistic freedom, is exercised is extremely important. While trying to push for more freedom of expression, the cultural and contextual conditions of communities must be respected. Freedom of expression is a universal human right, but it cannot be defined in universal terms. Thus, the main theoretical point here is that freedom of expression is not absolute. However, the question of where to draw its boundaries against “advocacy of religious hatred which constitutes incitement to discrimination, hostility or violence” is contextual implying due regard to local conditions, history, political tensions, etc.

Part I explores the question regarding the balance and complementarity between freedom of expression and freedom of religion. While endorsing the principle of universality, indivisibility, interdependence and interrelatedness of all human rights, including both freedom of expression and freedom of religion, this Part, however, argues that the right to freedom of expression is not absolute and, as will be seen later, recognizes that international human rights law affirms several limitations on exercising it. As this section will indicate, the question of defining those limitations is contextual. Part II examines the circumstances under which criticism of a religion could fall within the scope of Article 20 of the ICCPR and hence constitutes “incitement to discrimination, hostility or violence”. Part III examines whether or not protection of the right to freedom of expression in international human rights law requires States to punish advocacy of religious hatred.

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\(^8\) Throughout this article the term ‘advocacy of religious hatred which constitutes incitement to discrimination, hostility or violence’, as it appears in Article 20(2) of the ICCPR will be used instead of the well-known term ‘Hate Speech’, which is generally defined in words similar to those used in Article 20(2) of ICCPR—speech advocating or inciting acts of discrimination or violence towards a group of people or an individual based on hatred for their nationality, race, religion, or any other immutable characteristic. However, the paper notes that the two terms are generally used interchangeably. For literature on ‘Hate Speech’ see for example, Sandra Coliver (ed.), Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination (1992); Scott J. Catlin, ‘A Proposal for Regulating Hate Speech in the United States: Balancing Rights under the International Covenant on Civil and Political Rights’, (1994) 69:4 Notre Dam Law Review pp. 771–813; Elizabeth F. DeFeis, ‘Freedom of Speech and International Norms: A Response to Hate Speech’, (1993) 29 Stanford Journal of International Law pp. 57–130; Stephanie Farrior, ‘Molding the Matrix: the Historical and Theoretical Foundations of International Law Concerning Hate Speech’, (1996) 14:1 Berkeley Journal of International Law pp. 1–98; Stanley Fish, ‘Boutique Multiculturalism, or Why Liberals Are Incapable of Thinking about Hate Speech’, (1997) 23:2 Critical Inquiry pp. 378–395; David O. Brink, ‘Millian Principles, Freedom of Expression and Hate Speech’, (2001) 7 Legal Theory pp. 119–157.
which constitutes incitement to discrimination, hostility or violence in accordance with Article 20 of the ICCPR. Finally, the article ends with some conclusions in Part IV.

I. The Balance and Complementarity between Freedom of Religion and Freedom of Expression

The principles of universality, indivisibility and interdependence of human rights suggest that human rights are exercised in a context where rights coexist with each other. The coexistence of rights does not only imply that the exercise of these rights should be seen in a restrictive manner because of the existence of other rights, but also implies the fundamental notion of interdependency of human rights. The enjoyment of freedom of religion, by way of example, essentially requires guaranteeing and securing of other freedoms, including freedom of expression and freedom of assembly and association. Although the right to freedom of religion is characterized both as an individual and a collective right, it does not protect religions or beliefs per se. It has been pointed out that “the right to freedom of religion or belief, as enshrined in relevant international legal standards, does not include the right to have a religion or belief that is free from criticism or ridicule. Moreover, internal religious obligations that may exist within...

10 See the Report of Special Rapporteur on Freedom of Religion or Belief, Mrs. Asma Jahangir and Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Mr. Doudou Diène UN Doc. A/HRC/2/3, p. 10.
11 In describing the nature of the right to freedom of thought, conscience, and religion or belief, international law of human rights makes a distinction between freedom of thought, conscience, and religion or belief, on the one hand, and freedom to manifest one’s religion or belief, on the other. The former is conceived as admitting no restriction, while the latter is assumed to be subject to limitation by the state for certain defined purposes. In his landmark study, Kishnaswami has pointed out that the rationale behind this distinction originates from the distinction between the forum internum and the forum externum: “freedom to maintain or change religion or belief falls primarily within the domain of the inner faith and conscience of an individual. Viewed from this angle, one would assume that any intervention from outside is not only illegitimate but impossible”. Since the manifestations of religion or belief might have a direct impact on society at large, limitations of such manifestations may be a legitimate goal of overall social policy. See Mohamed S. M. Eltayeb, A Human Rights Approach to Combating Religious Persecution: Cases from Pakistan, Saudi Arabia and Sudan (Intersentia—Hart Publishers, Antwerpen, 2001), pp. 11–14.
12 Ibid., pp. 13–14.
13 In contrast to the majority of rights and freedoms set forth in the UDHR and ICCPR, Article 18 of both instruments explicitly affirms the individual as well as the collective aspects of religious freedom. The Article provides that freedom to manifest one’s religion or belief may be exercised either ‘alone’ or ‘in community with others’. The collective aspect of freedom to manifest religion or belief is of particular importance since intervention by the State to regulate or to limit manifestations of a religion or belief are more frequent when those manifestations are performed ‘in community with others’ than when they are performed ‘alone’ (ibid., p. 13).
a given faith (for example, prohibitions on representing religious figures) do not of themselves constitute binding obligations of general application. They are therefore inapplicable to persons who are not members of that religious group or community, unless their content corresponds to rights that are protected by human rights law”. In other words, freedom of religion primarily confers a right to act in accordance with one’s religion but does not bestow a right for believers to have their religion itself protected from all adverse comment. However, this is not to suggest that the protection of religious symbols from insult and denigration does not fall within the scope of freedom of religion. The question whether criticism, derogatory comment, insults or ridicule of a religion may encroach on the believer’s right to freedom of religion or belief can only be determined by examining whether such acts negatively affect the various aspects of the right to freedom of religion by the believer.

Despite the fact that the exercise of freedom of expression could in certain cases seriously affect the right to freedom of religion, it is inaccurate to present this phenomenon as a conflict between freedom of religion and freedom of expression. The two freedoms are interconnected and interdependent and what is required is an approach that endorses the principle of universality, indivisibility and interdependence of the two freedoms, on one hand, and strikes the balance and complementarity between them, on the other.

The right to freedom of expression is cherished and guaranteed as a fundamental right in international human rights law. Article 19 of both the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) protect freedom of expression. Moreover, both instruments set out certain limits on the exercise of the right to freedom of expression. However, it has to be noted in this regard that article 19 in both instruments maintains a clear distinction between freedom of opinion, on one hand, and freedom of expression on the other. By contrast, while freedom of opinion is subject to no restrictions, freedom of expression is subject to certain specified limitations. Article 19 of the UDHR does not provide for a limitation clause. However, the UDHR contains a general limitation clause in Article 29 which is applied to all the rights and freedoms set forth in UDHR. Unlike Article 19 of

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15 Ibid., p. 10.
16 Ibid., p. 10.
17 Ibid., p. 10.
18 Freedom of expression is also declared a fundamental human right in regional human rights instruments: Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 13 of the American Convention on Human Rights; Article 9 of the African Charter of Human and Peoples’ Rights; and Article 32 of the Arab Charter on Human Rights.
19 For the limitation to be legitimate under Article 29 of the UDHR, it must satisfy two essential criteria: (i) it must be determined by law, and (ii) it must be enforced solely for one or several of the purposes mentioned in the Article. The first purpose that makes the limitation permissible, is to secure ‘due recognition and respect for the rights and freedoms of others’. The other grounds used by Article 29 of are morality, public order and the general welfare of a democratic society. For an extensive study of the limitations under
the UDHR, Article 19 (3) of the ICCPR expressly provides for a limitation clause. These limitations shall only be such as are provided by law and are necessary: (a) for respect of the rights and reputations of others; (b) for the protection of national security or of public order, or of public health or morals. As will be discussed in Part II, freedom of expression under Article 19 of the ICCPR is further restricted by Article 20, which specifies that any propaganda for war and any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

It has to be emphasized that freedom of expression, like all other human rights, should not be conceived, articulated, or asserted in abstract terms; rather its nature should be informed by its internal and external political, economic, social, and cultural context. Moreover, it is important in this regard to acknowledge the dynamics of the tripartite relationship of mutual conflict and interdependence between those seeking self-expression and others who oppose it, as well as between such parties and the state, who is supposed to be the arbiter.

II. Criticism of a Religion which Falls under Article 20 of the ICCPR

The phenomenon of globalization has brought with it a series of new challenges. In particular, there is now much more awareness of, and prompt access to, information across borders and cultures. As a result, people of all opinions, beliefs and faith live in greater proximity, making the need for tolerance even more urgent. The protection of peaceful coexistence in today’s multicultural societies requires a balance between freedom of expression and freedom of religion and, consequently, the non-incitement of racial or religious hatred.

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20 See Article 19(3) of the ICCPR.
22 Ibid., p. 51.
24 See the Report of the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Mr. Doudou Diene, UN Doc.A/HRC/6/6, pp. 16–17.
As indicated above, the ICCPR contains three articles that deal with the relationship between freedom of religion and freedom of expression, namely Article 18 that protects freedom of religion, subject to such limitations as are necessary to protect public safety and order or the fundamental rights and freedoms of others [Article 18(3)]; Article 19 that protects freedom of expression, subject to certain restrictions such as respect of right and reputations of others [Article 19(3)]; and Article 20 which states that any propaganda for war and any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law. The basic principle that underlines the three articles is that any freedom or right is limited by respect for others and their rights. This part of the article primarily examines the admissible scope of limitations on critical thinking on religious issues and explores the circumstances under which criticism of a religion could fall within the scope of Article 20. It begins by analyzing Article 20(2) and then addresses the question of the admissible limitations on critical thinking on religious issues under Article 20(2).

A. Article 20 of the ICCPR

Article 20 of the ICCPR contains two specific prohibitions on two types of expression. This article provides that:

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

The travaux preparatoires (drafting history) of Article 20 is characterized by considerable controversy. This is evident by the voting roll, which is particularly true for paragraph 2 of Article 20, which was adopted with fifty votes in favour, eighteen votes against, and fifteen abstentions. The countries voted against paragraph 2 expressed the concern that Article 19 is already subject to too many restrictions in paragraph 3, and that Article 20 went too far in placing further restrictions. Those countries further pointed out that Article 20 did not belong to civil and political rights since it did not proclaim a human right. The controversy over Article 20 illustrates the complexity of the issues that are addressed in the article. These complex issues include, inter alia:

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25 For a detailed discussion of the drafting history of Article 20, see M.J. Bossuyt, Guide to the Travaux Preparatories of the International Covenant on Civil and Political Rights (Martinus Nijhoff Publishers, 1987); and Stephanie Farrior, supra note 8, pp. 21–49.
26 See Farrior, supra note 8, pp. 39–42.
27 Ibid., pp. 40–41.
The early drafting history of Article 19 showed that the Commission on Human Rights was considering to exclude from the right to freedom of expression “publications and other media of public expression which aim or tend to inflict injury, or incite prejudice or hatred, against persons or groups because of their race, language, religion, or national origin”. The language, however, was limited to incitement to violence. The early drafting history also reveals that a number of delegates were concerned not only with advocacy of hatred that would incite imminent violence, but also about the causal connection they saw between such advocacy and the problem of discrimination.

The question of protection against private actors generated considerable debate. Unlike most of the articles set forth in the ICCPR, Article 20 does not declare a right that individual holds vis-à-vis the government, instead it requires governments to prohibit certain behaviour of private actors vis-à-vis other private actors. It has been pointed out that although this provision is not the only one addressing private behaviour, it is more controversial than the others because involves government control of expression, with the attendant risk of government abuse of that control.

The question of whether to prohibit only incitement to violence or incitement to hatred generated considerable debate. Several delegates expressed the opinion that a provision which prohibited only incitement to violence would leave the door open to all other forms of intolerance. Furthermore, there was debate on whether to use the phrase “hatred or violence” instead of the phrase “hatred and violence”.

The drafting history of Article 20 reveals considerable discussion on the question of potential abuse by governments and some delegates pointed out that the wording of Article 20 would provide too much opportunity for government abuse.

Thus, the disagreement between the proponents and the opponents of Article 20 lies in two main issues: the potential abuse by the governments of the restriction placed by Article 20 on the right to freedom of expression and the difficulty of defining the terms ‘incitement’, ‘hostility’ and ‘hatred’.

In its General Comment No. 11 on Article 20, the Human Rights Committee indicates that the prohibitions imposed by Article 20 are fully compatible with
the right to freedom of expression as contained in Article 19, the exercise of which carries with it special duties and responsibilities. The Committee further points out that the prohibition under paragraph 1 extends to all forms of propaganda threatening or resulting in an act of aggression or breach of peace contrary to the UN Charter, while paragraph 2 is directed against any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, whether such propaganda or advocacy has aims which are internal or external to the State concerned.

Moreover, the Committee holds that the measures contemplated by Article 20(2) constitute important safeguards against infringement of the rights of religious minorities and of other religious groups to exercise the rights guaranteed by Articles 18 and 27 of the ICCPR, and against acts of violence and persecution directed towards those groups. However, the Committee did not attempt to offer any definition or interpretation of the phrase “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”. Furthermore, the Committee expressly indicates the distinctive nature of Article 20 as being explicitly not self-executing and, therefore, States parties to the ICCPR are obliged to adopt the necessary legislative measures prohibiting the action referred to in Article 20. The Committee states that for Article 20 to become fully effective there ought to be a law making it clear that propaganda and advocacy as described therein are contrary to public policy and providing for an appropriate sanction in case of violation.

B. Admissible Limitations on Critical Thinking on Religious Issues under Article 20(2)

Numerous situations can be identified in which religious communities or beliefs have been the target of acts ranging from critical analysis of a purely theological nature to the most extreme forms of incitement to violence or hatred against members of a religious group. Between these two extremes, one can find all sorts of expressions, including stereotyping, ridicule, derogatory comments and insults. These forms of expressions target either the content of religious beliefs themselves or the behaviour of its followers. It has been rightly argued that with regard to situations in which certain forms of expression confront religions or beliefs or members of religious or belief communities, it is essential to make a careful distinction between (a) forms of expression that should constitute an offence under international law, (b) forms of expression that are not criminally

35 See General Comment No. 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20) adopted by the Human Rights Committee on 29 July 1983.
36 Ibid.
37 Ibid.
38 Ibid.
39 Ibid.
41 Ibid.
punishable but may justify a civil suit and (c) forms of expression that do not give rise to neither criminal nor civil sanctions but still raise a concern in terms of tolerance, civility and respect for the religion or belief of others.\(^\text{42}\) It has to be emphasized that each of these situations should be assessed in its context according to its own merits and circumstances. Thus, the right to freedom of expression can legitimately be restricted for advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence against individuals or groups on the basis of their religion. Consequently, the threshold of the acts that are referred to in Article 20(2) is that they have to constitute advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence. The underlying human rights concerns of “defamation of religions” should, therefore, be addressed in this context.

The phenomenon of defamation of religions is a worldwide phenomenon.\(^\text{43}\) Incitement to racial discrimination, xenophobia and other related intolerance and the defamation of religions and religious hatred are interconnected issues.\(^\text{44}\) Discrimination and intolerance against religious communities and their members, which have historical and cultural roots, are facilitated in an environment where religions and beliefs are degraded or maligned through a deliberate intellectual and/or political discourse which demonizes them.\(^\text{45}\) While it is true that acts of defamation of religions are common in various parts of the world, it must be recognized that each one of these phenomena bears its specificity in their manifestations, expressions and frequency.\(^\text{46}\) A key issue in the analysis of the close link existing between defamation of religions and the right to freedom of expression lies in understanding the political and ideological context.\(^\text{47}\) However, for acts of defamation of religions to be prohibited and hence legitimately restricting the right to freedom of expression, they should satisfy the criteria set forth by Article 20(2), i.e. they advocate religious hatred that constitutes incitement to discrimination, hostility or violence. This may indicate that defamation of religions may offend people and hurt their religious feelings. But it does not thereby necessarily nor directly result in a violation of their rights, and the right to free-

\(^{42}\) Ibd.

\(^{43}\) See Human Rights Council’s Resolution ‘Combating defamation of religions’ adopted 20 March 2008, UN Doc. A/HRC/7/L.15. Although this resolution is entitled ‘Combating defamation of religions’, it does not define the term ‘defamation of religions’. It refers to the negative stereotyping of all religions and manifestations of intolerance and discrimination in matters of religion or belief.

\(^{44}\) See the Report of the Rapporteurs, supra note 10, p. 6.

\(^{45}\) Ibd.

\(^{46}\) Ibd.

\(^{47}\) According to the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Mr. Doudou Diene, this political and ideological context favours the incitement to racial and religious hatred and this can be indicated by the controversies about the caricatures of the Prophet Muhammad published by the fjallands-Posten newspaper in Denmark, see ibid., p. 4.
dedom of religion in particular. Thus, the questions arise in this regard include: what are the criteria and the definition for “advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence”? How could we distinguish between acts of defamation of religions that are tantamount to advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence and those which are not? What are the available guarantees against the potential abuse by governments when applying and invoking the criteria imposed by Article 20(2) on the exercise of both the right to freedom of religion and the right to freedom of expression? Is an act of religious defamation similar to or different from a racist statement, or in other words, what is the relationship between Article 20(2) of the ICCPR and Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)?

Neither the drafting history of Article 20 nor the General Comment No. 11 of the Human Rights Committee has defined the phrase “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”. Although the crucial question of distinguishing those forms of expressions that satisfy the criteria mandated by Article 20(2), and therefore constitute advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence, is a contextual one and takes into account the local conditions, history, culture and political tensions, it is, nevertheless, of utmost important to define the threshold of Article 20(2), particularly the phrase “advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence”, in order to draw the boundaries of the right to freedom of expression and hence the admissible limitations on critical thinking on religious issues falling within the scope of Article 20(2).

The jurisprudence developed by the Human Rights Committee regarding Article 20(2) of the ICCPR does not shed much light on the definition and the interpretation of acts of religious hatred that constitutes incitement to discrimination, hostility or violence. However, according to the Special Rapporteur on freedom of religion or belief only expressions that constitute incitement to imminent acts of violence or discrimination against specific individual or group should be prohibited under Article 20(2).

In this respect recourse may be made to the doctrine of ‘margin of appreciation’, which was developed by the former European Commission and the European Court of Human Rights. This will prove very useful not only in cases

48 Ibid., p. 10.
50 Ibid., p. 11.
involving competing rights, but also in cases pertaining to restrictions of rights.\textsuperscript{51} ‘Margin of appreciation’ essentially expresses the latitude allowed to States parties in their observance of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and its scope is influenced by the circumstances of the case.\textsuperscript{52}

Identifying the permissible limitations on critical thinking on religious issues that might fall under the scope of Article 20(2) requires a distinction between those acts of defamation of religions that are tantamount to advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence and those which are not. This distinction should be made with particular emphasis on the fact that embracing the full scope of both the right to freedom of religion and the right to freedom of expression is a pre-requisite to addressing the limitations on both rights. Moreover, such distinction should account for possible abuse by the governments in invoking the restrictions set forth in Article 20(2). Such abuse may result in undermining or nullifying the measures contemplated by Article 20(2) as important safeguards against both infringement of the rights of religious minorities and of other religious groups under Articles 18 and 27 of the ICCPR, and against acts of violence and persecution directed towards those groups.\textsuperscript{53} This might have far-reaching consequences in the case of a theocratic state where the claims of superiority, exclusivity, and monopoly of interpreting religious texts may lead to harassment, intimidation, and punishment of those individuals and groups who dissent from the official position as proclaimed by the state assuming the role of the guardian of faith.\textsuperscript{54} Furthermore, the distinction should also take into account that wide application of the restrictions imposed by Article 20(2) might have far-reaching implications not only on the right to freedom of expression, but also on scholarship on religious issues and may asphyxiate honest debate or research.\textsuperscript{55} Thus, the question of striking a balance between the right to freedom of religion and the right to freedom of expression is an extremely delicate exercise. It requires neutral and impartial implementation and must be weighed by independent and non-arbitrary bodies.\textsuperscript{56} In this respect, an independent judiciary is thus a vital component in the process of effectively adjudicating cases related to incitement of religious hatred under Article 20 of the ICCPR.\textsuperscript{57}


\textsuperscript{52} Bosma, \textit{ibid.}, pp. 132–133.

\textsuperscript{53} \textit{See} General Comment No. 11.

\textsuperscript{54} Eltayeb, \textit{supra} note 11, pp. 185–191.

\textsuperscript{55} \textit{See} the Report of the Rapporteurs, \textit{supra} note 10, p. 11.

\textsuperscript{56} \textit{Ibid.}, p. 14.

\textsuperscript{57} \textit{Ibid.}
The relationship between Article 20(2) of the ICCPR and Article 4 of the ICERD will be considered below in Part III.

III. Punishing Advocacy of Religious Hatred

The question of whether the promotion of freedom of expression requires States to punish advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence might be better illustrated and analyzed in the light of and with reference to Article 4 of the ICERD. Article 4 of the ICERD is considered among the central provisions of the Convention and it was regarded as central to struggle against racial discrimination. The International Convention on the Elimination of All Forms Racial Discrimination seeks to abolish racial discrimination through two methods: prohibiting incitement to racial hatred and promoting education.\textsuperscript{58} Article 4 thereof reads as follows:

\begin{quote}
States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention, \textit{inter alia}:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.
\end{quote}

The Committee on the Elimination of Racial Discrimination (CERD) explained that the provisions of Article 4 are of a mandatory character and of a preventive nature.\textsuperscript{59} The Committee pointed out that in order to satisfy their obligations under Article 4, States parties have not only to enact appropriate legislation, but also have to ensure that it is effectively enforced.\textsuperscript{60} Article 4 requires States parties to penalize four categories of misconduct: (i) dissemination of ideas based upon racial superiority or hatred; (ii) incitement to racial hatred; (iii) acts of violence against any race or group of persons of another colour or ethnic origin; and

\textsuperscript{58} See Farrior, supra note 8, p. 48.

\textsuperscript{59} See General Comment No. 7: Legislation to Eradicate Racial Discrimination (Art. 4) adopted by the Committee on Elimination of Racial Discrimination on 23 August 1985.

\textsuperscript{60} See General Comment No. 15: Organized Violence based on Ethnic Origin (Art. 4) adopted by the Committee on Elimination of Racial Discrimination on 23 March 1993.
(iv) incitement to such acts.\textsuperscript{61} In the opinion of the Committee, the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression.\textsuperscript{62} The Committee stated that the citizen’s exercise of this right carries special duties and responsibilities, specified in Article 29(2) of the UDHR, among which the obligation not to disseminate racist ideas is of particular importance.\textsuperscript{63}

Thus, in contrast to Article 20 of the ICCPR, Article 4 of ICERD requires States to prohibit not only advocacy of hatred, but also all dissemination of ideas based on racial superiority or hatred. Moreover, Article 4 mandates that incitement be made an offence punishable by law, which has been interpreted by the Committee as meaning a criminal offence, whereas Article 20 only requires that incitement be punishable by law, which could be met by a civil or administrative remedy in addition to criminal sanction.\textsuperscript{64} However, it has to be noted in this regard that not all States parties accord with the interpretation that Article 4 requires criminalizing incitement. Belgium, for example, has noted that Article 4 (a) does not explicitly require that the prohibited activities be made criminal offences, but simply refers to ‘offences punishable by law’, which can include civil law.\textsuperscript{65} Other States have pointed to the utility of civil liability in certain cases such as those involving unintentional discriminatory acts.\textsuperscript{66} However, the Committee has pointed out that Article 4(a) addresses racial discrimination \textit{per se}, and nowhere mentions intent.\textsuperscript{67} The Committee has further pointed out that the imposition of civil liability falls short of the requirement of Article 4 to declare certain acts or activities as offence punishable by law.\textsuperscript{68} Furthermore, the Committee has emphasized that Article 4 is not self-executing, and thus requires implementing legislation.\textsuperscript{69} The ‘due regard’ clause in Article 4 has been interpreted to give greater weight to the right to freedom from racial discrimination than to the right to freedom of expression.\textsuperscript{70}

With regard to the question of what is the available redress under Article 4, the Committee noted that Article 4 requires States parties to actively prosecute cases of alleged racial discrimination.\textsuperscript{71}

\textsuperscript{61} Ibid.
\textsuperscript{62} Ibid.
\textsuperscript{63} Ibid.
\textsuperscript{64} See Farrior, supra note 8, pp. 48–53.
\textsuperscript{65} Ibid. p. 51.
\textsuperscript{66} Ibid.
\textsuperscript{69} Ibid.
\textsuperscript{70} See Mahalic & Gambee Mahalic, supra note 67, pp. 74 and 89; and Farrior, supra note 8, pp. 51–52.
\textsuperscript{71} Yilmaz-Dogan v. The Netherlands (Communication No. 1/1984) in Annex IV of Report of the
Despite the fact that defamation of religions and religious hatred in most cases are interconnected with and interrelated to incitement to racial discrimination, xenophobia and related intolerance, it is nonetheless of utmost importance not to confuse racist statement with an act of defamation of religion. The elements constituting a racist statement are not the same as those constituting a statement of defamation of religion.\(^{72}\) The legal measures, and in particular the criminal measures, which have been adopted by national legal systems to fight racism may not necessarily be applicable to defamation of religion.\(^{73}\) Thus, whether the prohibition on dissemination of all ideas related to racial superiority or hatred is equally applicable to incitement of religious hatred should be addressed cautiously. It requires taking into account both the particularities of the question of advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence, and the contextual nature of the question of where to draw the boundaries of the right to freedom of expression against advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence. It also requires bearing in mind the primary objective of Article 20 in providing important safeguards against infringement of the rights of religious minorities and of other religious groups to exercise the rights guaranteed by Articles 18 and 27 of the ICCPR, and against acts of violence and persecution directed towards these groups. Legal measures should be seen as a part of wider strategies for combating advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence. In this regard education and both intra- and inter-religious dialogue are indispensable strategies in supporting legal measures.

IV. Concluding Remarks

The discussion above aimed at examining the admissible scope of limitations on critical thinking on religious issues and the circumstances under which criticism of a religion may fall within the scope of Article 20 of the ICCPR. As argued above, this question should be seen in terms of the balance and complementarity of the right to freedom of religion and respect for human dignity of believers against the right to freedom of expression. It is maintained that such a balance cannot be set for all places in the same way, but instead be maintained with respect to historical experiences and local conditions. Furthermore, it is argued that the right to freedom of expression is not absolute and that international human rights law affirms certain restrictions on exercising this right. The question, however, of where to draw the boundaries between the right to freedom of

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\(^{72}\) See the Report of the Rapporteurs, supra note 10, p. 12.

\(^{73}\) Ibid.
expression and advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence can best be answered contextually and with due regard to, *inter alia*, local conditions, history, culture and political tensions.

The following points in the preceding analysis may be emphasized as important criteria in examining the question of the admissible limitations on critical thinking on religious issues which may fall under the scope of Article 20 of the ICCPR:

- Balancing the right to freedom of expression and the right to freedom of religion, and consequently combating advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence is a central value for promoting peaceful coexistence in today’s multicultural societies.
- Despite the presence of a series of recent incidents relating to freedom of expression that polarize multicultural societies, cause tensions and fuel xenophobia and racist attitudes, it is rather inaccurate to present the phenomenon as an inherent conflict between freedom of religion and freedom of expression. The two freedoms are interconnected and interdependent and what is required is an approach that endorses the principle of universality, indivisibility and interdependence of the two freedoms, on one hand, and strikes the balance and complementarity between them, on the other.
- Although the right to freedom of religion or belief as enshrined in international human rights law does not *per se* protect religions or beliefs it does protect the right to freedom of thought, conscience and religion or belief and the right to freedom to manifest one’s religion or belief either individually or collectively, including the protection of religious symbols from insult and denigration. Moreover, respect for religions and beliefs and their protection from contempt is an essential and conducive element for all to exercise the right to freedom of thought, conscience and religion or belief.
- The measures contemplated by Article 20(2) constitute important safeguards against infringement of the rights of religious minorities and of other religious groups to exercise the rights guaranteed by Articles 18 and 27 of the ICCPR, and against acts of violence and persecution directed towards those groups.
- The right to freedom of expression can legitimately be restricted on the basis of the prohibition of advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence against individuals or groups on the basis of their religion. Hence, the threshold of the acts referred to in Article 20(2) is that they have to constitute advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence. The underlying human rights concerns of “defamation of religions” should, therefore, have to be addressed in this context.
• For acts of defamation of religions to be prohibited and, hence, legitimately restricting the right to freedom of expression, they should satisfy the criteria set forth by Article 20(2), i.e. they should advocate religious hatred that constitutes incitement to discrimination, hostility or violence.

• The question of distinguishing those forms of expressions that qualify the criteria mandated by Article 20(2), and therefore constitute advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence, is a contextual one and takes into account the local conditions, history, culture and political tensions.

• Identifying the permissible limitations on critical thinking on religious issues falling under the scope of Article 20(2) requires a distinction between those acts of defamation of religions that are tantamount to advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence and those which are not. This distinction should be made with particular emphasis on embracing the full scope of both the right to freedom of religion and the right to freedom of expression as a pre-requisite to addressing the limitations on both rights. Moreover, the distinction should account for possible abuse by the governments in invoking the restriction sets forth in Article 20(2). Furthermore, the distinction should take into account that wide application of the restrictions imposed by Article 20(2) might have far-reaching implications not only on the right to freedom of expression, but also on scholarship on religious issues.

• It is of utmost importance not to confuse a racist statement with an act of defamation of religion. The elements constituting a racist statement are not the same as those constituting a statement of defamation of religion. The legal measures, and in particular the criminal measures, which have been adopted to fight racism may not necessarily be applicable to defamation of religion.

• Legal measures should be seen as a part of wider strategies for combating advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence. In this regard, education and both intra- and inter-religious dialogue are indispensable strategies in supporting legal measures.